100

Supreme Court, U.S.
FILED

(1)

08-92 APR 23 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

In the
Supreme Court of the United States

MARILYN EGGERS,

Petitioner,

v.

MARCIA MOORE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MARILYN EGGERS
IN PRO PERSONNA
1181 EVELYN AVENUE
YPSILANT, MICHIGAN 48198
(734) 481-1812

July 17, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

THE QUESTION PRESENTED FOR REVIEW

Whether Petitioner is entitled to the protections of the Due Process Clause of the Fourteenth Amendment at the time that Petitioner has been placed on paid administrative leave of absence?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner is Marilyn Eggers (Eggers). In the proceeding before the Sixth Circuit, Eggers was the Plaintiff-Appellant, and Marcia Moore, Verna Anible, Raymond Bihun, Sharon Hill, Jim Ryan and Plymouth Canton School District were Defendants-Appellees.

Respondent

Marcia Moore, Verna Anible, Raymond Bihun Sharon Hill, Jim Ryan and Plymouth Canton School District are the respondents in this case.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Applicable Constitutional Provisions 1

Statement of the Case 1

Reasons for Granting the Petition 3

I. The Sixth Circuit Court's holding that no process was due prior to placing Petitioner on paid administrative leave is in conflict with the Seventh Circuit Court's ruling that suspension with pay from a statutorily protected employment position, might result in indirect economic effects that require the protection of the due process clause.

Conclusion 5

Appendix

Appendix A: January 24, 2008 Sixth Circuit Order denying rehearing 1a

Appendix B: December 19, 2007 Sixth Circuit Opinion 3a

Appendix C: August 5, 2006 District Court Memorandum and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint 10a

TABLE OF AUTHORITIES

Cases:

Board of Regents v. Roth,
408 U.S. 564; 92 S. Ct. 2701;
33 L. Ed. 2d 548 (1972) 4

Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984) . . . 4

Luelllen v. City of East Chicago,
350 F.3d 604 (7th Cir. 2003) 4, 5

Mathews v. Elderidge,
424 U.S. 319; 96 S. Ct. 893 (1976) 4

Peltier v. United States,
388 F.3d 984 (6th Cir. 2004) 3

Constitutions:

U.S. Constitution, Amend. XIV 1

Statutes:

28 U.S.C. § 1254 1

OPINIONS BELOW

The Order denying Plaintiff-Appellant's Motion for Rehearing issued by the Sixth Circuit Court of Appeals is reproduced in Appendix A. Marilyn Eggers v Marcia Moore, Verna Anible, Raymond Bihun, Sharon Hill, Jim Ryan and Plymouth-Canton School District, No. 06-22071 (6th Cir (Mich.), January 24, 2008). The Opinion of the Sixth Circuit Court of Appeals is reproduced as Appendix B. (December 19, 2007). The opinion of the District Court is reproduced in Appendix C. None have been reported.

JURISDICTION

The Order denying Petitioner's Motion for Rehearing was entered by the Sixth Circuit Court of Appeals on January 24, 2008. Jurisdiction to review the decision below is conferred upon this Court by 28 U.S.C. § 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty or property, without due process of law. U.S. Constitution. Amendment XIV.

STATEMENT OF THE CASE

Petitioner, was employed by Defendant, Plymouth-Canton School District as a teacher and following a staff meeting at Allen school on September 5, 2002, was handed a note requiring Petitioner to attend a

meeting at Defendant, Moore's office. The purpose of the meeting was to have Petitioner answer questions of incidents involving a male student in her classroom. Petitioner later learned the focus of the meeting was to investigate threats made to a female student. Petitioner was required to answer questions pertaining to threats to a student, and at that time requested an opportunity to have her lawyer present for the meeting. This request was denied.

Petitioner insisted that she have the opportunity to consult with counsel and have her attorney present for the questioning involving threats made to a student in her classroom. Petitioner would not answer questions without being able to have counsel present or being able to confer with counsel during the investigation. Petitioner was then required to leave the school and was initially placed on administrative leave of absence. Petitioner learned that, prior to the meeting, a substitute teacher had been hired to teach her classroom. This became known to the Petitioner when she went to her classroom to retrieve her belongings in advance of being escorted from the building.

Petitioner suffered a nervous breakdown following the meeting on September 5, 2002 and later the school district placed Petitioner on a medical leave of absence, after Petitioner's psychiatrist would not clear her to return to teaching. Petitioner continues to be on medical leave of absence.

Petitioner filed suit in district court arguing in part her due process rights had been violated, as she was being accused of threatening a student and wanted counsel present when being required to answer

questions concerning threats against a student. The district court granted respondents' Motion for Summary Judgment, concluding in part, that Petitioner had no due process rights to a hearing prior to being placed on paid administrative leave of absence. The Sixth Circuit Court of Appeals affirmed in an unpublished opinion. (App. B.)

REASONS FOR GRANTING THE WRIT

This petition tenders an important issue as to whether Petitioner is entitled to due process at a time when Petitioner is required to answer questions pertaining to threats made to a student when answering such questions could lead to prosecution or discipline by Petitioner's employer. This petition addresses an issue upon which the circuits are divided and this Court has yet to speak.[1]

The Sixth Circuit followed its own decision in *Peltier v. United States,* 388 F.3d 984, 988 (6th Cir. 2004), holding that no process was due prior to placing Petitioner on paid administrative leave of absence.

The Seventh Circuit has determined that "removal or suspension-even suspension with pay from a statutorily protected employment position, might produce indirect economic effects that trigger the

---

[1] This Honorable Court has yet to speak on the issue as to whether Petitioner is entitled to due process protections when Petitioner is placed on administrative leave of absence, as far as Petitioner is able to determine.

protection of the due process clause". *Luelllen v. City of East Chicago*, 350 F.3d 604, 613-614 (7th Cir. 2003).

This Honorable Court has previously recognized the necessity for the timely implementation of due process safeguards when a protected property interest is at issue. *Mathews v. Elderidge*, 424 U.S. 319; 96 S. Ct. 893 (1976). In *Mathews*, Justice Powell writing for the majority wrote, "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333. (Citations omitted).

The Fifth Circuit has concluded that public employees are entitled to pre-termination hearings under the due process clause if they have a cognizable property interest in continued employment. *Irby v. Sullivan*, 737 F.2d 1418, 1421 (5th Cir. 1984). *Board of Regents v. Roth*, 408 U.S. 564, 569-570; 92 S. Ct. 2701, 2705; 33 L. Ed. 2d 548 (1972).

The Sixth Circuit reasoned that as Petitioner was placed on "paid" administrative leave and that paid leave is "not an adverse employment action". The Sixth Circuit then determined that process was not due.

Petitioner was being investigated for threatening a student and any answers which were tendered during the investigative "meeting" could have thereafter been used in any administrative, civil or even criminal proceeding. Consequently, Petitioner's request in such a serious proceeding was a reasonable demand in light of the potential consequences had Petitioner made

admissions to improprieties committed against one of her students.

Petitioner had requested an opportunity to be heard as to the threats made to the female student with Counsel present due to the seriousness of the allegations at a "meaningful time" which was when she was being accused of threatening a student. The meaningful time in which Petitioner should have been permitted to address the allegations with her counsel present, was at a time when the events where clear in her mind and not at some future date when Petitioner was emotionally and psychologically incapable of addressing the same.

Petitioner's paid administrative leave of absence herein produced indirect economic effects that triggered the protections of due process. *Luellen*, supra. The indirect economic effects which followed the September 5th, 2008 meeting were the fact that Petitioner had suffered a psychological breakdown and has been on an unpaid medical leave of absence for the past few years. Petitioner notes that there was no demonstration of a sense of urgency to allow a minimal delay of the investigation/hearing to permit the appearance of counsel, as there had already been a substitute teacher assigned to teach Petitioner's students.

CONCLUSION

This petition presents a single issue of law. It is an issue important to our jurisprudence and which this Court has not yet specifically addressed. A clear and explicit conflict in the circuits exists. The petition

should be granted to allow briefing and a full examination of the issue.

Respectfully submitted,

Marilyn Eggers
In Pro Personna
1181 Evelyn Avenue
Ypsilanti, Michigan 48198
(734) 481-1812

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 06-2207

[Filed January 24, 2008]

Marilyn Eggers	)
	)
Plaintiff - Appellant	)
	)
v	)
	)
MARCIA MOORE; VERNA ANIBLE; RAYMOND BIHUN; SHARON HILL; JIM RYAN; PLYMOUTH-CANTON SCHOOL DISTRICT, Jointly and Severally,	)
	)
Defendants - Appellees	)

ORDER

BEFORE: Judges Kennedy, Martin, and Clay

Upon consideration of the petition for rehearing filed by the Appellant,

It is therefore **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/_____

Issued: January 24, 2008

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-2207

[Filed December 19, 2007]

MARILYN EGGERS,

Plaintiff - Appellant,

v.

MARCIA MOORE; VERNA ANIBLE; RAYMOND BIHUN; SHARON HILL; JIM RYAN; PLYMOUTH-CANTON SCHOOL DISTRICT,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: KENNEDY, MARTIN, and CLAY, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Marilyn Eggers, a grade school teacher, appeals the grant of a summary judgment motion dismissing her breach of contract and due process claims. Because we find no error in the well-reasoned decision of the district court, we AFFIRM.

I

Eggers began teaching full-time in the Plymouth-Canton School District in 1986. She taught second and third grade at Field Elementary school, and achieved tenure in 1988. Eggers took medical leave during the 1999-2000 and 2000-2001 school years. She returned in the fall of 2001 and was assigned to a different elementary school, Allen Elementary. There, Principal Marcia Moore decided to postpone the standard triennial evaluation of Eggers from the fall of 2001 to the following year. During the fall, a number of parents complained about Eggers, and some children were removed from her classroom. Moore then began an out-of-sequence evaluation, a procedure rarely used and not as clearly defined as a standard review. Eggers and Moore had meetings in February about the evaluation process, Moore observed Eggers in the spring twice, and a further meeting was held in June of 2002. During each meeting a union representative was present.

Apparently in response to another student incident, Eggers was handed a note on the morning of

September 5th from Moore that stated: "I am directing you to meet with me in my office immediately after the staff meeting today to discuss incidents that occurred in your classroom on August 29th and September 3rd. Your classroom will be covered by a substitute during this meeting." A union representative was present at the meeting. The meeting pertained to an alleged threat Eggers made to a student. Given the gravity of the charge, Eggers requested the presence of her attorney before answering questions. Moore refused to postpone the meeting, and demanded that Eggers respond to her questions. Eggers refused, and Moore immediately put her on administrative leave and escorted her from the building. Administrative leave includes full pay and benefits.

Around September 9th, the school again requested a meeting with Eggers, but she refused for medical reasons (she had begun seeking psychological treatment). Because of her inability to attend any meetings due to medical reasons, her leave was changed to medical leave. She has remained on medical leave ever since at the advice of her doctor.

In September of 2004, Eggers filed suit against Moore, the school district, and others alleging (1) a breach of contract arising from the out-of-sequence evaluation, (2) a violation of her rights under the Due Process Clause of the United States Constitution, and (3) intentional infliction of emotional distress. The district court dismissed all of the claims on summary judgment, and Eggers appealed the breach of contract and due process claims.

II

This Court reviews a district court's grant of summary judgment *de novo*. *Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir. 2005).

A. Motion to Strike the Brief

The parties have filed briefs relating to a request to strike the brief of Eggers for improper references to the record. Because we do not find that these references alter the outcome of this case, we do not need to reach this issue.

B. Breach of Contract

While an employee may sue an employer for breach of a collective bargaining agreement, she must ordinarily first exhaust any grievance or arbitration remedies provided by the agreement. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 163-64 (1983). Eggers never filed a grievance and therefore would generally be precluded by the collective bargaining agreement from suing her employer directly. An exception exists when the union breaches its duty of fair representation. If an employee can show that the union has breached its duty of fair representation in the grievance process, she can proceed with a suit against her employer for breach of the collective bargaining agreement. *Id.* at 165; *Knoke v. E. Jackson Pub. Sch. Dist.*, 506 N.W.2d 878, 880 (Mich. App. 1993). The "duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination

toward any, (2) to exercise its discretion with complete good faith and honesty, and (3) to avoid arbitrary conduct." *Goolsby v. City of Detroit*, 358 N.W.2d 856, 862 (Mich. 1984) (internal quotations omitted) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). However, "a union has considerable discretion to decide which grievances shall be pressed to arbitration and which shall be settled, and must be permitted to assess each grievance with a view to individual merit." *Knoke*, 506 N.W.2d at 881.

The district court correctly held that since Eggers had not availed herself of any of the union's mechanisms for making a complaint against her employer (in this case by filing a grievance), she could not prove that the union failed in its duty of fair representation, and therefore could not sue her employer in court. The only evidence of a failure of the union to meets its duty is that the union indicated it did not believe her claim had merit. Because this is well within the discretion of the union in this case, she cannot make out a claim of failure of a duty for fair representation, and therefore the district court appropriately granted summary judgment to the defendants.

C. Due Process

Eggers complains that she did not receive sufficient process prior to her forced administrative leave on September 5th following her refusal to answer questions without a lawyer. The Fourteenth Amendment says that no state may "deprive any person of life, liberty, or property, without due process

of law." U.S. CONST. amend. XIV. Due process is therefore triggered by some deprivation of life, liberty, or property. The district court correctly found that Eggers has not suffered any deprivation since she "has not been terminated or been disciplined in any way." Eggers points to her contentious September 5th meeting and subsequent placement on administrative leave as an adverse action triggering due process. However, this Court has held that paid leave is not an adverse employment action. *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004). Therefore we find that no process was due prior to placing Eggers on administrative leave.

Eggers also claims to have been constructively discharged. Due process may be triggered by a construction discharge. *See Parker v. Bd. of Regents of Tulsa Junior College*, 981 F.2d 1159, 1162 (10th Cir. 1992). Eggers therefore claims that by denying her a hearing in the presence of her lawyer prior to her constructive discharge, the school district denied her due process.

Even assuming she was constructively discharged, no process was denied her. Under her own interpretation of constructive discharge, she cannot be said to have been constructively discharged until she was placed on unpaid medical leave. *White v. Honeywell, Inc.*, 141 F.3d 1270, 1279 (8th Cir. 1998) (holding that a person "who has suffered a forced unpaid medical leave of absence" may be considered constructively discharged). Ever since the September 5, 2002 meeting, *prior* to being placed on medical leave, the school has been willing to meet with her to

discuss the accusations, and has never indicated that Eggers could not bring counsel. The school offered a rescheduled meeting as early as September 9th. Yet, as conceded at oral argument, Eggers has no pending request for such meeting. In fact, she has stated that since September 5, 2007 she has been medically unable to meet with school officials at all to discuss accusations. Eggers cannot be heard to complain that she was denied process that she has not asked for and that her own condition precludes. Thus, we find that the school has not failed to provide her with process.

III

We find that the well-reasoned decision of the district court was without error, and therefore AFFIRM.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 04-73860

[Filed August 15, 2006]

MARILYN EGGERS,	)
	)
Plaintiff,	)
	)
v.	)
	)
MARCIA MOORE, VERNA ANIBLE, RAYMOND BIHUN, SHARON HILL, JIM RYAN, and PLYMOUTH-CANTON SCHOOL DISTRICT,	)
	)
Defendant.	)

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

I. Introduction

This is an employment case. Plaintiff Marilyn Eggers (Eggers) is suing defendants, Marcia Moore, Verna Anible, Raymond Bihun, Sharon Hill, Jim Ryan, and Plymouth-Canton School District[1] claiming (1) breach of contract, (2) intentional infliction of emotional distress, and (3) violation of procedural due process.

Before the Court is defendants' motion for summary judgment on all of Eggers' claims and Eggers' motion to amend her complaint to add a claim based on her Fifth Amendment right to be free from self incrimination. For the reasons that follow, defendants' motion will be granted and Eggers' motion will be denied.

II. Background

The material facts as gleaned from the parties' papers follow.[2]

Eggers was first employed by the Plymouth-Canton School District (the school district) in the Fall of 1986

---

[1] Eggers also sued Robert Hayes and Ken Wolcott, who were subsequently dismissed.

[2] Neither party followed the Court's motion practice guidelines for a motion for summary judgment. Defendants did not file a statement of material facts not in dispute, nor did Eggers file a counter-statement of disputed facts in the required form. Most notably, neither party highlighted their exhibits.

as an elementary teacher. She was employed without incident until 1993.

Eggers was first off work in March 1993 through the remainder of the 1993-1994 and 1994-1995 school years for medical reasons. In March of 1999, she began to treat with a psychiatrist, Dr. Day, and was again off work during the 1999-2000 and 2000-2001 school years for medical reasons.

Eggers returned to elementary teaching in the Fall of 2001 and was assigned as a third-grade teacher at a new elementary school, Allen Elementary. The principal at Allen Elementary was defendant Marcia Moore (Moore). Defendant Jim Ryan (Ryan) was the Deputy Superintendent of the Plymouth-Canton School District. Defendant Verna Anible (Anible) was the Executive Director of Education Services. Defendant Sharon Hill (Hill) was Director of Elementary Education. Defendant Ryan Bihun (Bihun) was the Human Resource Director.

During Eggers' first semester at Allen Elementary, Moore received complaints from parents regarding Eggers' demeanor with students in the classroom. Eventually, Moore removed five students from Eggers' classroom. The record does not contain the specifics as to why the students were removed. Eggers testified at deposition that she was not aware why the students were removed and that she did not have an opportunity to speak with their parents prior to the students' removal.

Eggers apparently had a meeting with Moore on November 29, 2001 to discuss Moore's concerns regarding Eggers' classroom. The outcome of the meeting is not clear.

On November 29, 2001, Moore wrote to Eggers in which she stated that another parent called with concerns. The letter states in part:

> After discussing these concerns with Jim Ryan, Deputy Superintendent, Verna Anible, Executive Director of Educational Services, Sharon Hill, Director of Elementary Instruction and Bob Hayes, Director of Student Services, we will begin an out-of-sequence evaluation which is addressed in Section 8B2 of the PCEA contract. We intend to follow all of the requirements of the PCEA evaluation instrument and need your continued involvement in this process. We will discuss the formal observation schedule so that we are in compliance with the negotiated agreement. The process will begin in 60 days, on January 29, 2002.
>
> I have listed areas in the Teacher Evaluation report form that have been identified as needing improvement. I want this to be a collaborative process and need you to identify what activities will produce the necessary evidence of improvement in each area. ...

Moore identified 23 areas of improvement. Eggers says that she had previously received excellent evaluations in 14-15 of the 23 areas in the past.

Eggers was upset by the out-of-sequence evaluation. Eggers, was however, due for a standard evaluation during the 2001-2002 school year. That evaluation was postponed due to the decision to conduct an out-of-sequence evaluation.

On February 8, 2002, Eggers meet with Moore and a union representative to discuss the out-of-sequence evaluation. Eggers meet again with Moore on February 26, 2002. It is not clear from the papers what transpired at these meetings.

Following the announcement of the out-of-sequence evaluation, other students had incidents with Eggers which resulted in their removal from Eggers' classroom. According to defendants' papers, Ryan Brown was removed. After the removal, Brown's mother talked to Eggers about missing money for Ryan's yearbook, to which Eggers allegedly replied, "after everything you have done to me this year, I don't owe you any favors." On August 29, 2002, Eggers had an incident with Jacob Fountain, a student regarding his daily assignment journal. The incident ended with Eggers tilting the contents of his desk and Jacob crying. On September 3, 2002, Eggers had an incident with Kaiia Gavals, another student. Apparently, Eggers learned that Kaiia was the source who the information regarding Jacob Fountain which was reported to Jacob's mother. Eggers confronted Kaiia and told her that she was disappointed in her and that "you and I have a relationship problem." There was also an incident (the time of which is not clear from the papers) regarding student Alexandra Poma. Eggers says the incident involved the student

continuing to play with a marker after being told not to; the student cried as a result of the incident.

Meanwhile, in April 2002, Moore performed two classroom observations of Eggers. Eggers attended a meeting on June 14, 2002 at which time Moore's observations were discussed. Eggers had a second meeting on June 28, 2002, with Moore and Anible as well as Eggers' attorney. At all of these meetings, Moore had a least one union representative.

On September 5, 2002, Eggers was given a note from Moore which states in part:

> I am directing you to meet with me in my office immediately after the staff meeting today to discuss the incidents that occurred in your classroom on August 29th and September 3rd.

Eggers had union representative at this meeting. Eggers believed that she was being accused of threatening a student and refused to answer any questions and asked for her attorney to be present. She also asked that the meeting be postponed, which was refused. She was instead advised that if she did not answer questions, she would be placed on administrative leave. Eggers declined and was placed on administrative leave. Although the administrative leave was paid, Eggers said that she was not informed at that time that it would be paid.

Eggers was again asked to attend a meeting to discuss the incidents. Eggers' husband advised defendants that she could not attend any such meeting

and was seeking treatment with a psychologist. Indeed, Eggers did not participate in any investigation or discussion with defendants after September 5, 2002.

At some point, Bihun advised Eggers that her paid administrative leave was being changed to personal leave as a result of her inability to participate in an investigation because of medical reasons.

Eggers did not return to teaching for the remainder of the 2001-2002 school year. She also did not return to teaching in the 2002-2003, 2003-2004, 2004-2005, 2005-2006 school years on advice of her doctor. Each year, the school district has granted Eggers extensions of her medical leave. She remains on medical leave to date. As stated at the hearing, Eggers' medical leave is unpaid as she exhausted the time for paid medical leave.

At no time did Eggers file a grievance over any of the defendants' actions.

III. Defendants' Motion for Summary Judgment

A. Legal Standard

Summary judgment will be granted when the moving party demonstrates that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving

party." Matsushita Elec. Indus. Co v Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The nonmoving party may not rest upon his pleadings; rather, the nonmoving party's response "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P 56(e). Showing that there is some metaphysical doubt as to the material facts is not enough; "the mere existence of a scintilla of evidence" in support of the nonmoving party is not sufficient to show a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1968). Rather, the nonmoving party must present "significant probative evidence" in support of its opposition to the motion for summary judgment in order to defeat the motion. See Moore v. Philip Morris Co., 8 F.3d 353, 340 (6th Cir. 1993); see also Anderson, 477 U.S. at 249-50. Additionally, and significantly, "affidavits containing mere conclusions have no probative value" in summary judgment proceedings. Bsharah v. Eltra Corp., 394 F.2d 502, 503 (6th Cir 1968).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." In re Dollar Corp., 25 F.3d 1320, 1323 (6th Cir. 1994) (quoting Anderson, 477 U.S. at 251-52). The Court "must view the evidence in the light most favorable to the non-moving party." Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98, 101 (6th Cir 1995). Determining credibility, weighing evidence and drawing reasonable inferences are left to the trier of

fact. See Anderson, 477 U.S. at 255. Only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law may summary judgment be granted. Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001).

B. Eggers' Breach of Contract Claim

Defendants say that they are entitled to summary judgment on this claim because Eggers did not exhaust her administrative remedies. Eggers suggests that exhaustion would have been futile because a union representative, referred to as Portelli, advised her that she would not win. She also says that there is a question of fact as to whether she was required to file a grievance.

Defendants position is well taken. The Plymouth-Canton Education Association (union) is the exclusive bargaining representative for teachers in the Plymouth-Canton School District. Eggers is a member of the union and the terms and conditions of her employment are governed by a collective bargaining agreement (CBA) between the union and the school district. The CBA contains a grievance procedure by which disputes are to be resolved which provides for arbitration.

It is undisputed that Eggers never filed any grievances regarding any actions taken by defendants. Eggers suggests that filing a grievance would have been futile as she says a union representative indicated it would not be successful. Putting aside whether Eggers' failure to exhaust her remedies under

the CBA precludes her breach of contract claim, it is clear that in order to bring a breach of contract claim based on the CBA, she would also have to prove a breach of the union's duty of fair representation. Knoke v. East Jackson Public School District, 201 Mich. App. 480, 486 (citing Saginaw v. Chwala, 170 Mich. App. 459, 464-465 (1988); Pearl v. Detroit, 125 Mich. App. 228, 238-239 (1983)). Because Eggers never filed a grievance, she cannot show that the union breached its duty of fair representation. Her vague assertions that the union would not pursue the grievance are insufficient. Defendants are entitled to summary judgment on Eggers' breach of contract claim.

C. Eggers' Intentional Infliction of Emotional Distress Claim

Defendants argue that Eggers' claim for intentional infliction of emotional distress fails as a matter of law because her allegations of emotional distress do not rise to the level of extreme or outrageous conduct. Eggers disagrees and says that there is a genuine issue of material fact as to whether defendants' actions constitute intentional infliction of emotional distress.

To sustain an intentional infliction claim, Eggers must prove that defendants intended to inflict emotional distress and that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Roberts v. Auto-Owners Ins.

Co., 422 Mich. 594, 602-08, (1985). The Michigan Supreme Court has stated:

> The test for the severity of the conduct is whether the recitation of the facts to an average member of the community would arouse his or her resentment against the defendant and lead him or her to exclaim, "Outrageous!" It is not enough for the plaintiff to prove that a defendant acted with intent that is criminal, that a defendant intended to inflict emotional distress or that the conduct has been characterized by malice or a degree of aggravation that would entitle the plaintiff to damages under another theory of liability. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient. The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind. The law does not intervene in every case where someone's feelings are hurt.

See also Graham v. Ford, 237 Mich App 670, 674 (1999).

Eggers' claim is based on Moore's decision to conduct an out-of-sequence evaluation. Not only are such evaluations permitted by the CBA, Moore's decision cannot be said to constitute extreme and outrageous conduct. See Sankar v. Detroit Board of Education, 160 Mich. App. 470 (1987) (dismissing a plaintiff/teacher's intentional infliction of emotional

distress claim based solely on allegations that defendants undertook to evaluate her classroom performance, doing it in a negligent fashion with the specific intent of getting her to leave). While Eggers may have been distressed by the decision to conduct an out-of-sequence evaluation, and may disagree with Moore's noted areas of deficiencies in her performance, these facts simply do not make out an intentional infliction of emotional distress claim sufficient to survive summary judgment. Accordingly, this claim must be dismissed.

D. Eggers' Due Process Violation Claim

Defendants argue that this claim fails because Eggers had no due process right to a hearing before being placed on administrative leave. Eggers argues that defendants denied her due process in refusing to allow her to have counsel present before answering any questions regarding the incidents in her classroom and that as a public employee, she has a protected property interest in her continued employment.

Defendants' argument is well-taken. Eggers' confuses her due process rights as a public employee to a hearing prior to a termination or other discipline, such as a suspension. See Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985). Despite her argument to the contrary, Eggers has not been terminated or been disciplined in any way. When she refused to answer questions, she was not disciplined but rather placed on paid administrative leave and the school district scheduled another meeting so she could have counsel present. This was well within the law

based upon the circumstances, i.e. a concern for the children in her classroom. See id. at 544-45 (stating that when an employer received a significant hazard in keeping the employee on the job, it can avoid the problem by suspending without pay). Eggers, however, informed the school district that she could not attend any meetings due to her medical condition and provided a letter from her doctor stating that she could not work or participate in an investigation. Her status was then changed to medical leave. Indeed, for every school year since 2002, Eggers has provided medical reports indicating that she cannot work and has remained on medical leave. There is nothing in these facts which shows any due process violation. Eggers cites to no persuasive authority to the contrary. This claim must be dismissed.

IV. Eggers' Motion to Amend

Following the parties' briefing on the motion for summary judgment, Eggers filed a motion to amend her complaint to add a claim of "her Fifth Amendment right against self-incrimination is implicated in the facts and circumstances surrounding her being placed on paid administrative leave as a result of the incidents stated in the original complaint."

A. Legal Standard

Under Fed. R. Civ. P. 15(a), a party may amend their pleadings after 20 days "only by leave of court or by written consent of the adverse party; and leave to amend pleadings "shall be freely given when justice so requires." The decision whether or not to permit the

amendment is committed to the discretion of the trial court. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-32 (1971); Estes v. Kentucky Util. Co., 636 F.2d 1131, 1133 (6th Cir. 1980). This discretion, however, is "limited by Fed. R. Civ. P. 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits." See Marks v. Shell Oil Co., 830 F. 2d 68, 69 (6th Cir. 1987) (citation omitted). In determining whether to permit amendment, some of the factors which may be considered by the district court are undue "delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." Hageman v. Signal L.P. Gas, Inc. 486 F.2d 479, 484 (6th Cir. 1973). See also Foman v Davis, 371 U. S. 178, 182 (1962). Delay by itself is not sufficient to deny a motion to amend. Hagerman, 486 F.2d at 484. See also General Elec. Co. v. Sargent & Lundy 916 F.2d 1119, 1130 (6th Cir. 1990). Moreover, in denying a motion to amend, a court must find "at least some significant showing of prejudice to the opponent." Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir. 1986).

B. Analysis

The motion to amend comes too late in the day. Morever, it is difficult to understand why Eggers wants to add a Fifth Amendment claim since it does not apply to this civil action. Indeed, Eggers has not been criminally charged with anything. Morever, defendants had a right to question her regarding the

incidents in her classroom. The motion must be denied.

V. Conclusion

For the reasons stated above, defendants' motion for summary judgment is GRANTED. Eggers' motion to amend is DENIED.

SO ORDERED.

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: August 15, 2006

I hereby certify that a copy of the foregoing document was mailed to the parties of record on this date, August 15, 2006, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160